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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 432.

AETNA CASUALTY & SURETY COMPANY and J. A. JONES CONSTRUCTION COMPANY, Petitioners, vs. MRS. FANNIE M. FLOWERS, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

I.

OPINIONS OF COURT BELOW.

The only published opinion of the Court below is that of the United States Circuit Court of Appeals for the Sixth Circuit, found at **154 Federal (2) 881.**

II.

JURISDICTION.

The date of the decision of the United States Circuit Court of Appeals for the Sixth Circuit, sought to be reviewed, is April 17, 1946 (R. 19). A petition to rehear was seasonably filed (R. 24), and was denied June 17, 1946, and the petition for writ of certiorari was filed within the time provided by Statute.

The statutory provision believed to sustain the jurisdiction of this Court is 28 U. S. C. 347.

The decision sought to be reviewed orders a remand to the State Court of a suit theretofore removed by petitioners (the defendants therein) to the United States District Court on account of the diversity of citizenship, and in **Gay v. Ruff, 292 U. S. 25**, this Court held such a decision to be reviewable by this Court upon writ of certiorari. This Court granted the writ of certiorari on October 14, 1946 (R. 30).

III.

STATEMENT OF THE CASE.

This suit was commenced May 24, 1945, by the filing by respondent of a petition in the Chancery Court of Hawkins County, Tennessee, seeking to recover under the Tennessee Workmen's Compensation Act for the death of her husband, the defendants being the husband's employer and its insurer. The petition sought a recovery in behalf of respondent and her minor children of "the maximum sum allowed under the law, which sum is less than 60% of his average weekly wages, and that she recover the burial expenses in the sum fixed under the Statute * * * " (R. 4).

The petition alleged "that 60% of his average weekly wages over the statutory period of payment is in excess of $5000.00, which she is permitted to recover, and for this reason she sues in her own right and on behalf of her said minor children **for said sum**, together with the statutory burial fund allowed" (R. 3).

Petitioners in due season filed their petition for the removal of the suit to the United States District Court, alleging that they were foreign corporations, and that the amount in controversy exceeded $3000.00, exclusive of interest, penalties and costs (R. 8). Removal was ordered by the State Court (R. 9).

In the District Court petitioners filed a motion to dismiss for improper venue (R. 10), which motion was sustained (R. 12, 13). In the meantime, respondent had filed a motion to remand upon the grounds (a) that the suit was not one of a civil nature in law or equity, and hence not removable, (b) that the jurisdictional amount of $3000.00 was not involved, and (c) that notice of the filing of the petition for removal was not timely given (R. 11). Since

the motion to dismiss was sustained, the District Court pretermitted action upon the motion to remand.

Respondent perfected an appeal to the United States Circuit Court of Appeals, and that Court reversed the judgment of the District Court and ordered the case remanded to the State Court upon the sole ground that the amount in controversy did not exceed $3000.00, and that on this account the District Court lacked jurisdiction.

IV.

SPECIFICATION OF ERROR.

The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the District Court lacked jurisdiction of this case, and that the suit had been improperly removed thereto, this holding being erroneously predicated upon the ground that the requisite jurisdictional amount was not involved.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point One: Under the uniform construction of the Tennessee Workmen's Compensation Act, by all of the Courts of the State, the **"matter of controversy"** in a suit under the Act is not only the sum of the installments of compensation which have accrued at the time of the filing of the suit, but also all installments that might thereafter accrue. A judgment in favor of a claimant invariably embraces both past due and future installments. Therefore, both must be taken into consideration in determining whether there is present the jurisdictional amount necessary to give the United States District Courts jurisdiction.

Tennessee Code Sections 6885, 6890, 6891, 6893;
Southern Railway Company v. Grigsby, 155 Tenn. 285, 292 S. W. 3;
Central Franklin Process Company v. Gann, 175 Tenn. 267, 133 S. W. (2) 503;
Diamond Coal Mining Co. v. Curnutt, 179 Tenn. 278, 165 S. W. (2) 575;
Riley v. Knoxville Iron Company, 178 Tenn. 107, 156 S. W. (2) 398.

Point Two: Where the effect of the judgment upon defendants' liability for future accruing installments is not collateral only, but is determinative of defendants' liability, the sum of such future installments must be considered in determining whether or not the United States Courts have jurisdiction.

Thompson v. Thompson, 226 U. S. 551;
Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 293 U. S. 98;

Schunk v. Moline, Milburn & Stoddard Co., 147 U. S. 499;
Wetmore v. Rymer, 169 U. S. 115.

Point Three: A suit to enforce a cause of action created solely by State Statute is nevertheless removable if the remedy and procedure prescribed by the Statute is substantially consistent with the ordinary modes of procedure in the United States Courts.

United States Constitution, Article III, Sec. 2;
Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123;
Ex parte McNeil, 13 Wall. 236, 243, 20 L. Ed. 624;
Railway Company v. Whitton, 13 Wall. 270, 286, 20 L. Ed. 571;
Davis v. Gray, 16 Wall. 203, 20 L. Ed. 447;
Wehrman v. Conklin, 155 U. S. 314, 324, 39 L. Ed. 167;
Cowley v. Railroad Co., 159 U. S. 569, 582, 40 L. Ed. 263;
Traction Company v. Mining Company, 196 U. S. 239, 253, 49 L. Ed. 462;
Terrall v. Burke Construction Company, 257 U. S. 529, 66 L. Ed. 352.

Point Four: The notice of the petition for removal was timely.

28 U. S. C. 72;
Lee v. Insurance Company, 292 Fed. 408;
Miller v. Telephone Company, 279 Fed. 896;
Williams v. New York, etc., Railway Company, 11 Fed. (2) 363;
Cropsey v. Sun etc. Publishing Assn., 215 Fed. 132;
Potter v. General Baking Co., 213 Fed. 697.

PREFATORY STATEMENT.

This Court has granted the writ of certiorari to review an order of the United States Circuit Court of Appeals for the Sixth Circuit remanding this case to the State

Court, whence it was removed on the ground of diversity of citizenship. The remand was predicated upon the sole ground that the jurisdictional amount was not present. The questions raised by the petition for writ of certiorari are covered by **Point One** and **Point Two** of the foregoing "Summary of Argument", and we understand these are the only questions that will be considered here.

However, respondent in her brief in opposition to the petition for writ of certiorari has advanced additional grounds in support of the order of the Circuit Court of Appeals which were not ruled upon by that Court. These additional grounds are responded to in **"Point Three"** and **"Point Four"** of our "Summary of Argument."

POINT ONE.

The Workmen's Compensation Act of Tennessee was adopted in 1919. Unlike most such Acts, it is administered by the Courts rather than by an Administrative Commission.

Section 6885 of the Code of Tennessee regulates the procedure. This section, which is reproduced in the Appendix, provides in substance that in case of a dispute over or failure to agree upon compensation, either the employer or the claimant **"may submit the entire matter for determination to the Judge * * * and such Judge * * * is hereby vested with jurisdiction to hear and determine the issues and render judgment and enforce the same in the same manner as courts of record render and enforce judgments."**

Section 6890 of the Code provides that, with the consent of the Circuit Court, the amounts of compensation payable periodically may be commuted to one or more lump-sum payments.

Section 6891 of the Code provides in substance that where the amount paid or to be paid in settlement or by award does not exceed the compensation for six months' disability," the award shall be final and not subject to readjustment.

Section 6893 of the Code provides in part as follows:

> "Any time after the amount of any award has been agreed upon by the parties, or found and ordered by the Court, a sum equal to the present value of all future installments of compensation calculated on a six per cent basis, may * * * be paid by the employer to any savings bank or trust company of this State * * * and such sum, together with all interest thereon, shall be held in trust for the employee or the dependents of the employee, who shall have no further recourse against the employer."

In applying these provisions of the Act, all the Courts of Tennessee, including the Court of last resort, have construed the language of Code Section 6885 to the effect that the parties "may submit the **entire matter** for determination," as conferring jurisdiction upon the courts to adjudge in one single suit the entire and ultimate rights and liabilities of the parties. Invariably the judgment embraces both past due and future installments of compensation.

This fact is illustrated by the case of **Central Franklin Process Company v. Gann, 175 Tenn. 267.** In that case the trial Court made an award of compensation in favor of a disabled employee. This award was affirmed by the Supreme Court of Tennessee. That Court described the judgment it was affirming in this language:

> "It was further held that petitioner was permanently and totally disabled within the meaning of the Compensation Act, and she was awarded compensation at the rate of $6.58 for four hundred weeks, and

at $5.00 per week for an additional one hundred and fifty weeks, this recovery to be credited by the payments theretofore made."

Central Franklin Process Co. v. Gann, supra, p. 276.

We have picked at random three Workmen's Compensation cases decided by the Supreme Court of Tennessee in favor of the claimant, and to illustrate the form of the judgments entered in these cases by the Court, we quote excerpts from these judgments.

In **Southern Railway Company v. Grigsby (1927), 155 Tenn. 285**, where there was an award in favor of the employee's widow, the minute entry (Supreme Court Minute Book 1926, page 181) provides:

"It is further ordered and decreed that the plaintiff, Daisy L. Grigsby, for the use of herself and her said minor children, is lawfully entitled to collect from the defendant Southern Railway Company the further sum of $11.00 per week for the period of 122 weeks from and after March 30, 1927, these payments to be made on the 1st and 15th of each calendar month, provided that during said period she, the said Daisy L. Grigsby, shall live and remain unmarried * * *."

In **Riley v. Knoxville Iron Company (1941), 178 Tenn. 107 (Minute Book 1942, page 85)**, the minute entry provides:

"It is further ordered, adjudged and decreed by the Court that appellant * * * have and recover from said appellees * * * the sum of $5.00 per week from May 26, 1940, during his dependency, not exceeding 400 weeks * * *."

In **Diamond Coal Mining Company v. Curnutt, 179 Tenn. 278**, the minute entry (Minute Book 1942, page 67) provides:

"It is further the judgment of the Court that Fannie C. Curnutt have and recover 8⅓% of the average weekly wages of William Curnutt for a period of 400 weeks, being from the date of his death, May 22, 1941, and subject to termination as provided in said law, and for the purpose of such payments this case is remanded to the Circuit Court of Anderson County to the end that the payments be made at the end of each month into the hands of the Clerk of said Court."

Since the "amount in controversy" is the amount for which the Court **may** render judgment, and since the Courts of Tennessee have uniformly construed the statute in question as authorizing the rendition of judgment for both past due and future installments of compensation, it seems clear that such construction is binding upon the Federal Courts, and that both amounts must be considered in determining whether the Federal Courts have jurisdiction.

POINT TWO.

In **Wetmore v. Rymer, 169 U. S. 115**, it was held that a suit cannot be properly dismissed on the ground that the subject matter is of less value than the jurisdictional amount, "unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a logical certainty of the conclusion based on them. Nothing less than this is meant by the Statute when it provides that the failure of its jurisdiction on this account 'shall appear to the satisfaction of said Circuit Court.'"

In the **Thompson case**, supra, the Supreme Court of the District of Columbia made an award in favor of the wife in a suit for maintenance, the award being payable $75.00 per month. The Court of Appeals of the District reversed, and the wife perfected an appeal to this Court. The ques-

tion was there made that the required jurisdictional amount of $5000.00 was not present, since that amount had not yet accrued. In upholding its jurisdiction, the Court said:

"The present appeal is based upon Section 8 of the Act of February 9, 1893, to establish a Court of Appeals for the District of Columbia * * * which section gives a writ of error or appeal to review in this Court any final judgment or decree if the Court of Appeals 'in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.' Appellee challenges our jurisdiction on the ground that the matter here in dispute does not exceed the sum mentioned.

"Under the decree of the Supreme Court the payments of $75.00 per month for support of the wife and child were to commence on July 15, 1909. Supposing that decree to be now reinstated by a reversal of the decree of the Court of Appeals, the installments already accrued would amount to considerably more than one-half of the jurisdictional amount. The expectancy of life of the parties is clearly sufficient to make up the balance.

"It is true that the obligation to make such payments for maintenance in the future, even when fixed by judicial decree, is not in the nature of a technical debt.

* * * * * * *

"The statutory maintenance is thus assimilated to alimony, in that it is subject to be modified from time to time, or even cut off entirely, in the event of a change in the circumstances of the parties; and it of course ceases wholly upon the death of the husband. (Citing cases.)

"Nevertheless, such a decree clearly and finally settles the obligation of the husband to contribute to the support of the wife and offspring, and fixes the amount of contributions required for the present to fulfill that obligation. The future payments are not in any proper sense contingent or speculative, although

they are subject to be increased, decreased, or even cut off, as just indicated.

"The statute conferring jurisdiction on this Court, while requiring that the matter in dispute shall exceed $5,000.00, does not require that it shall be of such a nature as to constitute (if the event be favorable) a technical debt of record."

Thompson v. Thompson, 226 U. S. 551, 558.

The **Pinkston case**, supra, is directly in point and covers every issue upon which the Court of Appeals has predicated its decision. In that case, the plaintiff, the widow of a deceased member of defendant Brotherhood, was entitled to receive a pension of $30.00 per month during her life, except that in the event of her remarriage, the pension was to cease. The Brotherhood became financially involved, and determined to abolish its Pension Department and to make a lump sum settlement of not to exceed $1500.00 with each widow on its pension rolls. Plaintiff brought suit in the Federal District Court to protect her rights. That Court held that the requisite jurisdictional amount was not present. In upholding jurisdiction, Mr. Justice Sutherland said:

"The entire fund is nearly $300,000. The bill proceeds on the theory that this constitutes a trust fund, and seeks its administration under judicial orders. Respondent urges that the jurisdiction may well be tested by the value of the whole fund. But we put that question aside, since we are of opinion that the value of respondent's own interest in the fund exceeds the jurisdictional amount.

"This, it will be seen, is not an action at law to recover overdue installments, but a suit in equity to preserve and protect a right to future participation in the fund. If the value of that right exceeds $3,000, the district court has jurisdiction.

"In the Thompson case, a decree had been entered by the Supreme Court of the District of Columbia in

favor of a wife against her husband, for support and maintenance at the rate of $75 a month, together with $500 for counsel fees. The decree was reversed by the Court of Appeals of the District. On an appeal to this court, our jurisdiction was challenged upon the ground that a sum in excess of $5,000 was not involved, as the statute at that time required. While the installments already accrued amounted to much less than that, it was held that the expectancy of life of the parties was clearly sufficient to make up the balance, and jurisdiction was upheld. Mr. Justice Pitney, who delivered the opinion, said (p. 560): 'The future payments are not in any proper sense contingent or speculative, although they are subject to be increased, decreased, or even cut off, as just indicated.'

"The situation there and that here fairly cannot be distinguished. The life expectancy of respondent, as shown by the mortality tables, is enough to bring the value of the future pension installments, as of the date of the suit, to a sum much in excess of $3,000; and as to that no point is made. **The jurisdictional defect said to exist is that the payments are to cease in the event of respondent's remarriage; and this condition, petitioners say, makes future payments depend entirely upon the volition of the widow, and whether they may accrue is, therefore, a matter of pure speculation. Indeed, the happening of the event does not depend (if that would matter) upon the widow's volition alone, but equally upon the willingness of another to marry her.** Continuance of payments durings the life of the respondent is fixed by contract quite as definitely as continuance of payments for maintenance in the **Thompson** case was fixed by decree, and subject to substantially like conditions subsequent. In the **Thompson** case the payments were subject to be cut off entirely, not only by death but, the court said, 'In the event of a change in the circumstances of the parties.' The same is true here. In no respect are we able to see any difference in principle between the two cases. The occurrence of

the specified event which would put an end to the obligation is no more uncertain in one case than in the other."

Brotherhood of Locomotive Firemen & Enginemen v. Pinkston, 293 U. S. 98, 99.

In the **Schunk case**, supra, the plaintiff, under a Nebraska Statute, sued upon a series of promissory notes, of which only $530.09 were past due, together with the further sum of $1664.04 to become due in the future, and sought an attachment upon the ground that the defendant was about to fraudulently convey his property. Suit was commenced in the United States Court upon the ground of diversity of citizenship, and the jurisdiction of that Court was challenged because the required jurisdictional amount was not present. In upholding jurisdiction, the Court said:

> "It matters not that, by the showing in the petition, part of this sum was not yet due. Plaintiff insisted that it had a right to recover all. That was its claim, and the claim which was disputed by the defendant. Suppose there were no statute in Nebraska like that referred to, and the plaintiff filed a petition exactly like the one before us, excepting that no attachment was asked for, and the right to recover anything was challenged by demurrer, would not the matter in dispute be the amount claimed in the petition? Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute."

Schunk v. Moline, etc., Company, 147 U. S., 499, 504.

The **Schunk case** is analogous to the case at bar, in that a statute authorized a judicial determination of the liability of the defendant **in advance of the maturity of plaintiff's claim.** The value of the unmatured part of the claim was taken into consideration in determining the question

of jurisdiction. The Tennessee Workmen's Compensation Act has exactly the same effect.

The Circuit Court of Appeals predicated its decision upon the line of insurance cases, like **Wright v. Mutual Life Insurance Company, 19 Fed. (2d) 17, affirmed 276 U. S. 602,** wherein it was held that in a suit to recover past due installments due under a life insurance policy, the fact that the judgment would have the **collateral effect** of estopping the defendant to deny liability for future installments was not sufficient to justify inclusion of the future installments in making up the required jurisdictional amount. These authorities are not applicable for the reason, as already pointed out, that the effect of a judgment in a Tennessee Workmen's Compensation suit upon future installments is not a **collateral** effect. The judgment itself awards a recovery for future installments, and that judgment is absolutely final, with the sole exception that it may be modified in the event of changed conditions, just as in the **Thompson case,** supra.

If the decision under consideration is permitted to stand, then the Federal District Courts can never acquire jurisdiction of a Tennessee Workmen's Compensation suit. The maximum weekly installment recoverable is $18.00. Section 6884 of the Code of Tennessee requires the suit to be brought within one year from the date of injury, and $3000.00 of benefits cannot accrue within that year.

POINT THREE.

Article III, Section 2, of the Constitution of the United States provides that "The judicial power shall extend to all cases, in law and equity, * * * between citizens of different States * * *". Whether a suit filed in the State Court is removable to the United States Courts depends upon whether the United States Courts have original

jurisdiction thereof. The point here made by respondent is that a suit under the Tennessee Workmen's Compensation Act is not a case "in law and equity", and that petitioners have been required by the State Statute to waive or surrender their right of removal.

As before stated, the Tennessee Act is court-administered. The procedure in the trial Court, as well as in the Appellate Court, is governed in detail by Section 6885 of the Code of Tennessee. (See Appendix.) Briefly stated, the procedure is this: In the event of a disagreement between the injured employee or the dependents of a deceased employee and the employer or its insurer, either party may file a petition in the County, Circuit, Criminal or Chancery Court of the County in which the accident occurred. (They are all the nisi courts of record of Tennessee.) Process is issued requiring the defendant to appear and file answer. The case is then heard on oral testimony and a judgment is rendered by the Court. Either party dissatisfied with the judgment may appeal **"as in other civil cases,"** to the next term of the Circuit Court, if the suit originated in the County Court, otherwise to the Supreme Court of the State.

The procedure on appeal is identical with that of any other civil suit, with the exception that, while the Workmen's Compensation Act was adopted in 1919, the Legislature in 1925 created an intermediate appellate court. Section 10 of the Act creating this new Court provides that "The jurisdiction of the Court of Appeals shall be appellate only, and shall extend to all civil cases except those involving constitutional questions • • • Workmen's Compensation • • •".

Therefore, insofar as appellate procedure is concerned, Workmen's Compensation cases are placed in a group of

cases, including those involving constitutional questions, the right to hold public office, State revenue, mandamus, etc. In this group of cases the appeal lies direct to the Supreme Court, whereas in other civil cases the appeal is to the Court of Appeals or intermediate appellate court.

It is no bar to the jurisdiction of the United States Courts that the cause of action is founded on State Statute and did not exist at common law.

Clark v. Smith, 13 Pet. 195, 203, 10 L. Ed. 123;
Ex parte McNiel, 13 Wall. 236, 243, 20 L. Ed. 624;
Railway Company v. Whitton, 13 Wall. 270, 286, 20 L. Ed. 571;
Davis v. Gray, 16 Wall. 203, 20 L. Ed. 447;
Wehrman v. Conklin, 155 U. S. 314, 324, 39 L. Ed. 167;
Cowley v. Railway Company, 159 U. S. 569, 582, 40 L. Ed. 263;
Traction Company v. Mining Company, 196 U. S. 239, 253, 49 L. Ed. 462.

In **Clark v. Smith**, supra, the Court said:

> "The State Legislature • • • having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of procedure on the Chancery side of the Federal Courts, no reason exists why it should not be pursued in the same form as it is in the State Courts."
>
> **Clark v. Smith**, supra, 203.

The case of **Traction Company v. Mining Company**, supra, was filed in the State Court under the Eminent Domain Statute of the State of Kentucky, and was removed to the United States Court on the ground of diversity of citizenship. In upholding the jurisdiction of the United States Court, Mr. Justice Harlan used this language:

"The rule is now settled that, under the judiciary act of 1887, 1888 (24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 508, 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508) a suit cannot be removed from a state court unless it could have been brought originally in the circuit court of the United States. (Citing cases.)

"Why could not the proceeding instituted in the county court have been brought originally in the Federal court? The case, as made in the county court, was, beyond question, a judicial proceeding; it related to property rights; the parties are corporate citizens of different states; and the value of the matter in dispute exceeded the amount requisite to give jurisdiction to the circuit court. It was, therefore, a proceeding embraced by the very words of the Constitution of the United States, which declares that the 'judicial power shall extend * * * to controversies * * * between citizens of different states,' as well as by the Act of 1887 (Sec. 1), which declares 'that the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, * * * in which there shall be a controversy between citizens of different states.' In view of these explicit provisions it is clear that the proceeding in the county court was a suit or controversy within the meaning both of the Constitution and of the judiciary act. We could not hold otherwise without overruling former decisions of this court. Let us see whether this be not so.

"Referring to the clause of the Constitution defining the judicial power of the United States, Chief Justice Marshall, speaking for the Court in Osborn v. Bank of the United States, 9 Wheat. 738, 819, 6 L. Ed. 204, 223, said: 'This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United

States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States.'

"In Kohl v. United States, 91 U. S. 367, 376, 23 L. Ed. 449, 452, which was a suit in the Circuit Court of the United States to condemn lands for a public building, this Court, speaking by Mr. Justice Strong, said: 'It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statutes, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right.'

"Two cases very much in point are Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, and Searl v. School Dist. No. 2, 124 U. S. 197, 31 L. Ed. 415, 8 Sup. Ct. Rep. 460.

"Mississippi & R. River Boom Co. v. Patterson was a case of condemnation under a statute authorizing a county district court to appoint commissioners to appraise the value of the property to be taken. The local statute provided that if the appraisement was not satisfactory, the matter could be brought before the court, where the issues of fact would be tried by a jury, unless a jury was waived. It was a case of diverse citizenship, and, upon the petition of the defendant, a citizen of another state, it was removed from the inferior local court to the circuit court of the United States. One question was whether the case was, in its nature, excluded from the jurisdiction of the Federal court. Referring to the contention that the proceeding to take private property for public use was an exercise by the State of its sovereign right of eminent domain, and with its exercise the United

States, a separate sovereignty, had no right to interfere by any of its departments, this court, speaking by Mr. Justice Field, said: 'But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding **before the courts** between parties,—the owners of the land on the one side and the company seeking the appropriation on the other,—**there is a controversy which is subject to the ordinary incidents of a civil suit**, and its determination derogates in no respect from the sovereignty of the state.' Again, in the same case: 'It has long been settled that a corporation will be treated, where contracts or rights of property are to be enforced by or against it, as a citizen of the state under the laws of which it is created, within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different states. * * *

* * * * * * *

"We cannot doubt, in view of the authorities, that the case presented in the county court was a 'suit' or 'controversy between citizens of different states,' within the meaning of the Constitution and the laws of the United States. It was, as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky, as ordained by its Constitution (Ky. Const., Sec. 140); and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record."

Traction Company v. Mining Company, supra.

That the remedy prescribed by the Tennessee Workmen's Compensation Act is "substantially consistent with the ordinary modes of proceeding" in non-jury cases in the Federal Court is demonstrated by the fact that the

United States District Courts have encountered no difficulty in disposing of the numerous Tennessee Workmen's Compensation cases filed therein or removed thereto, at least one of which found its way to this Court (**Southern Extract Company v. Green, 103 Federal [2d] 232, 308 U. S. 568**).

The position of respondent that petitioners, by coming into Tennessee and accepting the benefits of its Workmen's Compensation Law, have waived their right of removal is without merit. The case of **Terrall v. Burke Construction Company, 257 U. S. 529, 66 L. Ed. 352**, involved a Statute of the State of Arkansas, which provided in substance that if a domesticated foreign corporation shall, without the consent of the other party, remove any suit to the Federal Court, it shall be the duty of the Secretary of State to forthwith revoke its authority to do business in the State. In holding this Statute to be unconstitutional and void, the Court, speaking through Mr. Chief Justice Taft, said:

> "The cases in this court in which the conflict between the power of a state to exclude a foreign corporation from doing business within its borders, and the Federal constitutional right of such foreign corporation to resort to the Federal courts, has been considered, cannot be reconciled. • • •
>
> "The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the Federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been

suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one state the right to resort to Federal courts in another; that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured, is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."

Terrall v. Burke Construction Company, supra, pp. 532-3.

POINT FOUR.

The Removal Act does not prescribe the length of the notice to be given of the filing of the petition for removal. It simply prescribes that "Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same" (28 U. S. C. 72).

There is a difference of opinion as to the purpose of this notice. One line of authorities is that the purpose of the notice is to afford the opposite party an opportunity to appear and be heard **upon presentation of the petition to the State Court—not upon the mere filing of the petition with the Clerk of the State Court.**

Lee v. Insurance Company, 292 Fed. 408.

The other view is that the plaintiff has no right to be heard in the State Court upon an application for removal; that his only right to be heard is upon a motion in the Federal Court to remand, and that the purpose of the notice is simply to advise him that the right to remove has been exercised.

Miller v. Telephone Co., 279 Fed. 896.

That the latter is the true purpose of the notice is very strongly indicated by the case of **Chicago etc. Railway Company v. Roberts, 164 U. S. 704, 41 L. Ed. 1183.**

However, it is not necessary to here decide this question, for in the instant case the notice was received by counsel for respondent on May 29th, whereas the order of removal was made and entered on June 7th,—nine days later, and that certainly is timely notice.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed; that this Court should adjudge that this cause was removable, and properly removed, to the United States District Court, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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Note: All emphasis in quotations is ours.

APPENDIX.

Tennessee Code Section 6885—In case of a dispute over or failure to agree upon compensation under this chapter between the employer and employee or the dependents of the employee, either party may submit the entire matter for determination to the Judge or Chairman of the County Court in which the accident occurred, and such Judge or Chairman is hereby vested with jurisdiction to hear and determine the issues and render judgment and enforce the same in the same manner as courts of record render and enforce judgment. The County Judge or Chairman shall have the power to subpoena witnesses, administer oaths and punish witnesses for contempt; and, in short, he shall have such powers in conducting hearings under this chapter as are possessed by the Judges of the Circuit Courts as courts of general jurisdiction. Officers serving process, subpoenas and other papers shall have the same fees now provided by law for such offices in the Magistrates' Courts.

The party invoking the power of said Court shall file a petition setting out the facts on which the claim is based under this chapter. Upon said petition being filed, the Clerk of the County Court shall issue and cause to be served on the defendant named in said petition a summons accompanied by a certified copy of the petition, commanding the defendant to appear and make defense to said petition before the Judge or Chairman of said County Court. Said summons shall be served on the defendant as in other civil cases at least ten days before the time the matter is to be heard. The County Judge or Chairman shall set claims for hearing not more than fifteen days after the filing of the petition unless for good cause shown. The defendant shall file an answer to said petition on or against the day specified in the summons, unless the Court grants further time in which to answer on good cause shown by

affidavit. Should the defendant fail to answer the petition within the time prescribed, a judgment pro confesso will be entered against him, and the cause proceeded with ex parte. The Judge or Chairman trying the case shall hear the evidence offered by either or both parties, and render judgment. Either party dissatisfied with the judgment of the Judge or Chairman may appeal as in other civil cases to the next term of the Circuit Court of the County, where the cause will be heard by the Circuit Judge de novo. The cause shall be heard by the Circuit Judge without a jury, and as other non-jury civil cases are heard in the Circuit Court. Neither party shall have the right to demand a jury. It shall be the duty of the County Judge or Chairman of the County Court, in carrying out the provisions of this chapter, to keep a docket of all claims presented to him for settlement or adjudication, and he shall cause to be entered on a separate minute book a final record of his findings and conclusions in litigated cases, as well as of orders, compromises or settlements made by him. * * * The party filing the petition may, at his option, instead of filing the same before the County Judge or Chairman, file the same as an original petition in either the Circuit, Criminal or Chancery Court of the County in which petitioner resides, or in which the alleged accident happens, in which event summons shall be issued by the Clerk of the Court in which the proceeding is instituted, and shall be returned before said Court within the time provided for proceedings before a County Judge or County Chairman. The issue shall be made in the same manner, and the presiding Judge shall proceed to hear the case as provided in case of appeal from the County Judge or Chairman. Whenever any matter is brought before the County Judge or Chairman, or before any Judge, as provided herein, the said County Judge or Chairman, or any Judge, may, if he so desires, visit the scene of the accident and examine the surroundings.

Any party to the proceedings in the Circuit, Criminal or Chancery Court may, if dissatisfied or aggrieved by the judgment or decree of that Court, pray an appeal in the nature of a writ of error to the Supreme Court, where the cause shall be heard and determined in accordance with the practice governing other appeals in the nature of a writ of error in civil causes.

The trial of all cases under this law shall be expedited by (a) giving all such cases priority over all other cases on the trial docket in the trial Court other than cases involving State revenue; (b) by allowing any case on appeal in the Supreme Court to be, on motion of either party, transferred to the Division where the Supreme Court is then or will next be in session.

Tennessee Code Section 6890—The amounts of compensation payable periodically hereunder may be commuted to one or more lump sum payments. These may be commuted only with the consent of the Circuit Court. In making such commutation, the lump sum payment shall, in the aggregate, amount to a sum equal to the present value of all future installments of compensation calculated on a six per cent basis. No settlement or compromise shall be made except on the terms herein provided.

Tennessee Code Section 6891—All settlements of compensation by agreement of the parties, and all awards of compensation made by the Court, where the amount paid or to be paid in settlement or by award does not exceed the compensation for six months' disability, shall be final and not subject to readjustment.

Tennessee Code Section 6893—Any time after the amount of any award has been agreed upon by the parties, or found and ordered by the Court, a sum equal to the present value of all future installments of compensation calculated on a six per cent basis, may (where death or the nature of

the injury renders the amount of future payments certain) by leave of Court, be paid by the employer to any savings bank or trust company of this State, to be approved and designated by the Court, and such sum, together with all interest thereon, shall be held in trust for the employee or the dependents of the employee, who shall have no further recourse against the employer. The payment of such sum by the employer, evidenced by the receipts in duplicate of the Trustee, one of which shall be filed with the Division of Workmen's Compensation, and the other filed with the Clerk of the Circuit Court, shall operate as a satisfaction of said award as to the employer. Payments from said fund shall be made by the Trustee in the same amount and at the same time as are herein required of the employer until said fund (and) interest shall be exhausted. In the appointment of the Trustee, preference shall be given, in the discretion of the Court, to the choice of the injured employee or the dependent of the deceased employee, as the case may be.

Note: The above references are to the Code of Tennessee of 1932.